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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1988

BROWN-FORMAN CORPORATION,

Petitioner,

v.

TENNESSEE ALCOHOLIC BEVERAGE COMMISSION, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Question Presented

Tenn. Code Ann. § 57-3-202(e) provides that distilled spirits and wines cannot be sold to Tennessee wholesalers unless the supplier has affirmed that the price to them is no higher than that being charged contemporaneously to any wholesaler in any other state. Tennessee has no price-posting requirement, and suppliers are therefore free to change their prices to Tennessee wholesalers at any time without regulatory approval, prior notice and waiting period, or compliance with any other prerequisite imposed by the State.

Does the Tennessee lowest-price affirmation statute, on its face and as demonstrated by the evidence of record, violate the Commerce Clause by effecting (1) direct, extra-territorial regulation of prices in other states and (2) simple economic protectionism, because the practical effect of the contemporaneous affirmation requirement is inevitably to restrict the freedom of suppliers to change their prices in other states in response to differing market conditions and competitive forces and to deprive out-of-state wholesalers and consumers of the lower prices otherwise possible in the competitive circumstances of their particular markets? If so, a subsidiary issue is whether the Twenty-first Amendment saves such regulation.

List of Parties and Rule 28.1 List

The parties to the proceedings below were the petitioner, Brown-Forman Corporation, which was the plaintiff in the District Court, and the Tennessee Alcoholic Beverage Commission, its Director, Elyon H. Davis, its members, Martha Warfield, Carl A. Jones and Ellida Fry, and the Attorney General of the State of Tennessee, the defendants. The plaintiff and the defendants were, respectively, the appellee and appellants before the Court of Appeals for the Sixth Circuit.

The District Court granted the motion to intervene of the Licensed Beverage Wholesalers of Tennessee, a trade association composed of Tennessee wholesalers. It was an intervenor-appellant before the Court of Appeals.

The Wine and Spirits Wholesalers of America, Inc., a trade association, submitted a brief to the Court of Appeals as *amicus curiae* in support of the appellants there.

Petitioner, Brown-Forman Corporation, has no parent companies, subsidiaries (except wholly- owned subsidiaries) or affiliates.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, Brown-Forman Corporation, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United State Court of Appeals for the Sixth Circuit, entered in the above-entitled action on November 4, 1988.

Opinions Below

The opinion of the Court of Appeals for the Sixth Circuit is reported at 860 F.2d 1354 and appears in the appendix hereto, p. 1a, *infra*.

The memorandum decision of the United States District Court for the Middle District of Tennessee, Nashville Division (Nixon, D.J.) has not been reported. It is reprinted in the appendix hereto, p. 21a, *infra*.

Jurisdiction

Invoking the jurisdiction of the District Court under 28 U.S.C. § 1331 because of the federal constitutional issue raised, the petitioner brought this declaratory judgment action in the Middle District of Tennessee to challenge the constitutionality of Tennessee's statute which conditions the sale of spirits and wines to wholesalers in that state upon a lowest-price affirmation requirement. Following trial, the District Court found the requirement to be in violation of the Commerce Clause and permanently enjoined enforcement of the offending statute.

On respondents' appeal, the Sixth Circuit, on November 4, 1988, reversed the judgment of the trial court and remanded with instructions to dissolve the injunction and dismiss the complaint. (App., p. 20a) Rehearing was not sought.

The jurisdiction of this Court to review the judgment of the Sixth Circuit is invoked under 28 U.S.C. § 1254(1).

Constitutional Provisions and Statute

U.S. Const., art. I, § 8, cl. 3:

> The Congress shall have Power . . . To regulate Commerce with foreign Nations and among the several States. . . .

U.S. Const., amend. XXI, § 2:

> The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Tenn. Code Ann. § 57-3-202(e) appears in its entirety in the appendix, p. 33a. The central provisions are as follows:

> (1) Every manufacturer, distiller, rectifier, factor, broker, or vintner of alcoholic spirituous beverages or vintage alcoholic beverages shall, before offering for sale to any licensed wholesaler or distributor in the state of Tennessee any brand of alcoholic spirituous beverage or vintage alcoholic beverages, file with the alcoholic beverage commission an affirmation of corporate policy with regard to sales of all brands owned, controlled, sold, offered for sale, franchised or distributed by such manufacturer, distiller, rectifier, factor, broker or vintner in this state;
>
> (2) The affirmation shall certify that the manufacturer, distiller, rectifier, factor, broker or vintner shall not willfully sell or offer for sale any alcoholic spirituous beverage or vintage alcoholic beverages of a particular brand, proof or size, in Tennessee at a price higher than the price such liquors are sold or offered for sale to licensed wholesalers in any other state in the United States.

Statement of the Case

Petitioner ("Brown-Forman") produces and imports distilled spirits and wines. It sells its products in interstate commerce to independent wholesalers in more than 30 states, including Tennessee.[1]

1. Brown-Forman also sells its brands to the so-called "control states" (or "monopoly states"), where the state itself conducts the business in wine and/or spirits by performing the wholesale or retail functions.

Since 1975, Tenn. Code Ann. § 57-3-202(e) has imposed an affirmation requirement upon Brown-Forman and other suppliers as a condition to their selling their brands to Tennessee wholesalers. Before offering any brand to wholesalers there, the supplier must file with the respondent Tennessee Alcoholic Beverage Commission (the "ABC") an "affirmation of corporate policy." § 57-3-202(e), subsection 1. That affirmation must certify that the supplier will "not willfully sell or offer for sale any . . . particular brand, proof or size, in Tennessee at a price higher than the price" to wholesalers in any other state. *Id.*, subsection 2. Failure to file, the making of a false affirmation, or willful violation of the affirmation pledge is punishable as a misdemeanor and refusal, revocation or suspension of the supplier's license for not less than a year. *Id.*, subsections (4) and (5).

Following this Court's decision in *Brown-Forman Distillers Corp.* v. *New York State Liquor Auth.*, 476 U.S. 573 (1986), Brown-Forman advised the ABC that it was withdrawing its affirmation. The Tennessee Attorney General thereafter rendered an opinion in which he found that the Tennessee affirmation statute is distinguishable from New York's "prospective" statute struck down in *Brown-Forman* and is not in violation of the Commerce Clause. His opinion, in salient part, concluded:

> Tennessee's affirmation statute is neither prospective nor retrospective in its operation. Rather, Tennessee's law refers to a "contemporaneous" time period as the reference point for the lowest or affirmed price. A contemporaneous affirmation requirement means that a supplier must affirm that its prices are no higher than its prices elsewhere at the very time of sale to a Ten-

> nessee wholesaler. It is our opinion that a contemporaneous statute does not impose the impermissible extraterritorial effects on interstate commerce that seem inherent in a prospective statute. Unlike the New York law condemned in *Brown-Forman*, under a contemporaneous affirmation law like Tennessee's, a supplier, after making its sale to a Tennessee wholesaler, is free to alter its pricing policies, as it chooses, in wholesale liquor transactions in other states. (Rec. 38-39)[2]

The State Attorney General also noted that in *Brown-Forman* this Court "specifically did not overrule its earlier decision in *Joseph E. Seagram & Sons, Inc.* v. *Hostetter*, 384 U.S. 35 (1966);" he concluded that, "by [thus] failing to address the issue of the validity of affirmation statutes that do not operate prospectively, the Court has left this question open." (Rec. 38)

Following that opinion, Brown-Forman, seeking to enjoin enforcement of the affirmation requirement as a violation of the Commerce Clause, brought this declaratory judgment action against the ABC. At the trial, the ABC Director testified that more than half of Tennessee's residents live in counties bordering other states and that its affirmation requirement attempts to prevent Tennessee consumers from crossing state lines to buy liquor. (Rec. 231)

Brown-Forman presented uncontradicted evidence of substantial variations in the competitive conditions encountered from market to market among the various states, the disparate success of its brands in those markets, and the resulting need to charge lower prices for particular

2. "Rec. —" references are to the portions of the record on appeal contained in the joint appendix filed with the Sixth Circuit.

brands in various markets in order to achieve sales. Based upon its long-time compliance with the affirmation statutes of more than twenty states prior to the Court's decision in *Brown-Forman* and its consequent inability to price in response to the competitive forces unique to different markets, Brown-Forman's proof showed how affirmation inhibits such incentive pricing. For example, if a supplier raises its price in Tennessee, it has to increase any lower price to that level in every other state. Furthermore, if the price to Tennessee wholesalers is higher at any time, it must be reduced to the lowest price dictated by the competitive circumstances in any out-of-state market. That added-cost or loss-of-revenue deterrent to pricing in response to the differing competitive circumstances of each particular market is compounded by the number of states which impose affirmation, because the lowest price must be matched in all of them. As testified by one of Brown-Forman's sales executives, the affirmation requirements of Tennessee and other states keep the out-of-state prices of brands higher than those the differing competitive forces of each market would otherwise produce. (Rec. 101-106, 109-114, 116-120, 143-147, 181)

Because the ABC had neither instituted any enforcement proceedings nor promulgated any rules or regulations, the trial court concentrated on whether the Tennessee affirmation law "on its face" violates the Commerce Clause. The court held that the statute "is facially unconstitutional because of its effect on interstate commerce." (App., p. 26a)

The District Court recognized that the Tennessee affirmation requirement "is neither prospective nor retrospective, but 'contemporaneous' in that a supplier must affirm

that its prices are no higher than its prices elsewhere at the very time of the supplier's sale to a Tennessee wholesaler." (App., p. 29a) As the Tennessee Attorney General had, the trial judge also noted that in *Brown-Forman* this Court had not overruled its decision in *Seagram* sustaining the facial constitutionality of a retrospective statute and had ruled explicitly only with respect to prospective affirmation statutes. He nevertheless concluded that it was "theoretical conjecturing" to urge, as the ABC did, that "once a supplier has made its sale to a Tennessee wholesaler, it is free to alter its pricing policies in wholesale liquor transactions in other states as it chooses." (*Id.*)

Because *Brown-Forman* established that "the 'practical effect' of the questioned statute is the touchstone for determining its validity," the trial judge found as follows:

> What is clear to this Court is that the "practical effect" of Tennessee's affirmation statute, as currently set forth, is to control the prices of Brown-Forman products in other states. It is clear that if a liquor distiller, such as plaintiff, desires to raise its prices in Tennessee, it must raise its price first in every other state in which the product is sold. Tennessee's affirmation statute works to deny consumers in other states the benefits of a free competitive market and the availability of [Brown-Forman's] 77-17 promotional allowance program or of quantity discounts fails to offset the extra-territorial effect of Tennessee's projected legislation.[3]

(App., p. 30a)

The District Court also rejected the contention that the Tennessee affirmation statute was a valid exercise of the

3. For a description of Brown-Forman's 77-17 lump sum, unconditional promotional allowance program, see *Brown-Forman*, 476 U.S. at 576-577.

state's Twenty-first Amendment powers. The court held that the Amendment empowers Tennessee to control sales only in Tennessee, not in other states, and, further, citing *Bacchus Imports, Ltd.* v. *Dias,* 468 U.S. 263 (1984), that "state laws that constitute mere economic protectionism are not entitled to the same deference as laws enacted to combat the perceived evils of unrestricted traffic of alcoholic beverages." (App., pp. 30a-31a)

The Court of Appeals did not question any of the trial court's findings of fact as "clearly erroneous." To the contrary, the Court of Appeals concluded that the evidence showed that in transactions outside Tennessee the affirmation requirement increases supplier prices and the costs to out-of-state wholesalers:

> The record in the case at bar confirms that the natural tendency of the Tennessee staute is to increase costs outside of Tennessee. . . .

(App., p. 13a) Similarly, noting the evidence that "price elasticity of demand" for liquor "varies significantly in different parts of the country," the Court of Appeals said,

> [W]e agree that the natural tendency of the Tennessee statute is to impair the efficiency of the interstate liquor market and to deprive consumers of the benefits, if that is the word, of access to the most liquor for the least money.

(App., p. 9a)

The Tennessee statute does not require any posting of prices to be charged there. Consequently, that statute does not require suppliers to affirm that they will adhere for any period to prices posted in advance, does not require

governmental approval to change prices there or elsewhere, and does not impose any waiting period before prices can be changed anywhere. The Court of Appeals decided, therefore, that the "Tennessee statute leaves distillers free to change their out-of-state prices at will" and that it "lacks the obvious extraterritorial reach [of the prospective] New York statute" which was found in *Brown-Forman* to run afoul of the Commerce Clause. (App., p. 2a)

Based upon its interpretation of *Brown-Forman*, the Court of Appeals stated that the question before it was "whether Tennessee has actually undertaken to 'regulate' liquor prices in other states." (App., pp. 9a-10a) The court then concluded that *Brown-Forman* holds only "that a statute making it illegal to reduce out-of-state prices is a statute that 'directly regulates' such prices in violation of the Constitution." (App., p. 10a) *Brown-Forman*, according to the Court of Appeals, does *not* teach

> that where a price affirmation statute has the effect of making out-of-state price cuts costlier to the distiller, the statute is unconstitutional even though it does not make such price cuts illegal, as the New York statute did.[4]

(App., p. 10a)

4. The opinion below further states:

> All the distiller can argue here is that the Tennessee statute tends to discourage out-of-state price reductions—because such price reductions must be replicated in Tennessee—just as the statute tends to encourage price increases outside Tennessee, because Tennessee prices cannot be raised without raising foreign prices as well. Price moves as such are not illegal anywhere, as far as Tennessee is concerned, although they may be more costly, from the distiller's standpoint than they would be in the absence of the statute.

(App., pp. 11a-12a)

The Court of Appeals relied upon *Seagram* for its conclusion that non-prospective affirmation statutes, although they force higher prices in other states and make out-of-state price reductions costlier by also forcing the supplier to reduce its prices and revenues in the affirmation states, are not the "direct regulation" of prices in violation of the Commerce Clause:

> The teaching of the Supreme Court's decision in *Seagram*, as we understand it, is that a tendency to increase the distiller's out-of-state costs is simply not enough to convert an otherwise constitutional state liquor law into an impermissible "regulation" of out-of-state liquor prices.
>
> * * * *
>
> The [retrospective New York statute upheld in *Seagram* was] more restrictive than the Tennessee statute. Under the New York statute a distiller could not lower wholesale prices anywhere outside New York without locking itself into a correspondingly low price in New York for all of the next month, while the Tennessee law has no comparable effect. If the New York statute did not constitute "regulation" of out-of-state prices, therefore, it follows *a fortiori* that the Tennessee statute does not constitute such regulation.
>
> * * * *
>
> If *Seagram* is still good law, this means that Tennessee "may constitutionally insist that liquor prices to domestic wholesalers . . . be as low as prices offered elsewhere in the country." That, and nothing more than that, is what Tennessee has done in the statute before us.
>
> While the natural tendency of the [retrospective] New York law to increase out-of-state costs would seem to have been just as apparent on its face as is the corresponding tendency of the Tennessee statute, the *Seagram* opinion does mention that the actual effects of

> the New York statute on the distiller's business outside the state were "largely matters of conjecture." . . .
>
> * * * *
>
> On its face, the Tennessee statute seems calculated to affect interstate commerce less drastically than the statute that was upheld in *Seagram*. If the Supreme Court should wish to decide whether *Seagram* is still valid, therefore, this would probably be a good case in which to do it. If not, we assume that lower courts ought to follow *Seagram* in every case to which that decision obviously applies.

(App., pp. 12a-14a)

Finally, the Court of Appeals rejected Brown-Forman's contentions that the Tennessee statute, in depriving out-of-state residents of their local competitive advantages, was "simple economic protectionism" and a virtual *per se* violation of the Commerce Clause. See *Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978); *Brown-Forman*, 476 U.S. at 579-580. Again relying upon *Seagram*, the court ruled:

> Where the Twenty-first Amendment is concerned, however, the short answer to this argument would seem to be that *Seagram* expressly rejected it: "As part of its regulatory scheme for the sale of liquor, [a state] *may* constitutionally insist that liquor prices to domestic wholesalers and retailers be as low as prices offered elsewhere in the country." *Seagram*, 384 U.S. at 43 (Emphasis supplied) There has been no showing here that the Tennessee statute "disadvantages" out-of-state consumers any more than the statute upheld by the Supreme Court in *Seagram* did. . . .
>
> * * * *
>
> *Seagram* teaches that statutes comparable to Tennessee's do not, on their face, "discriminate" against interstate commerce, . . .

(App., pp. 16a-17a)

Holding that the District Court erred as a matter of law in declaring the Tennessee statute unconstitutional, the Court of Appeals reversed and remanded with instructions to dismiss the complaint.

REASONS FOR GRANTING THE WRIT

I.

The Sixth Circuit's Decision That The Tennessee Affirmation Statute Does Not Violate The Commerce Clause Conflicts With The Principles Or Reasoning Of Applicable Decisions Of This Court

The Sixth Circuit has taken an unjustifiably narrow view of what constitutes that "direct regulation" of out-of-state transactions which is a virtual *per se* violation of the Commerce Clause. Citing *Brown-Forman,* it has determined that only an affirmation statute "making it illegal to reduce out-of-state prices . . . 'directly regulates' such prices in violation of the Constitution." (App., p. 10a)

Inexplicably, the Sixth Circuit has determined that affirmation statutes are constitutional if they merely make out-of-state price reductions costlier by compelling suppliers, as a condition to selling there, to reduce their prices in the affirmation states, too, risking diminished revenues there. It made that determination in the face of its conclusion that the evidence in this case confirms that the inevitable effect of the Tennessee statute on out-of-state transactions is to increase supplier prices and costs to wholesalers in other states and to deprive consumers there of the market efficiencies which could afford them lower prices.

The Sixth Circuit misreads this Court's decision in *Brown-Forman;* the determination below conflicts with the principles and reasoning of *Brown-Forman* and the Court's endorsement there (476 U.S. at 582) of *United States Brewers Ass'n.* v. *Healy,* 692 F.2d 275 (2d Cir., 1982), *aff'd mem.,* 464 U.S. 909 (1983) (*"Healy I"*). This Court did *not* hold or suggest that only "a statute making it illegal to reduce out-of-state prices is a statute that 'directly regulates' such prices in violation of the Constitution." (App., p. 10a)

The New York prospective affirmation statute overturned in *Brown-Forman* did not "make out-of-state price reductions illegal." Instead, it prohibited and made illegal only sales to New York wholesalers if, during the month-long period that the posted New York price was in effect, an out-of-state sale was made at a lower price.[5] In deciding that the New York statute fell "within that category of direct regulations of interstate commerce that the Commerce Clause wholly forbids" because it "effectively regulate[d] the price at which liquor is sold in other States," this Court looked to "the overall effect of the statute on both local and interstate commerce" as the "critical consideration" (476 U.S. at 579) in determining whether "the 'practical effect' of the law is to control liquor prices in other States." *Id.* at 583.

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5. The majority opinion in *Brown-Forman* states:

> The State of New York requires every liquor distiller or producer that sells liquor to wholesalers within the State to sell at a price that is no higher than the lowest price the distiller charges wholesalers anywhere else in the United States. The issue in this case is whether that requirement violates the Commerce Clause of the Constitution.

476 U.S. at 575.

Throughout its *Brown-Forman* opinion, this Court made it clear that the controlling principle is whether or not the "practical effect" of an affirmation statute is to leave a supplier free to change its prices elsewhere in the United States in response to differing market conditions and competitive forces, because "regulation tending to 'mitigate the consequences of competition between the states' constitutes direct regulation." *Id.* at 581-582. Similarly, because a law which "disadvantages consumers in other States" is "the sort of 'simple economic protectionism' that this Court has routinely forbidden," the Court concluded in *Brown-Forman* that

> While a State may seek lower prices for its consumers, it may not insist that producers or consumers in other States surrender whatever competitive advantages they may possess. . . . Economic protectionism is not limited to attempts to convey advantages on local merchants; it may include attempts to give local consumers an advantage over consumers in other States.

Id. at 580. (Citations omitted)

The reasoning of *Brown-Forman* conflicts with the Sixth Circuit's reliance upon *Seagram* as "teaching . . . that a tendency to increase the distiller's out-of-state costs is simply not enough to convert an otherwise constitutional state liquor law into an impermissible 'regulation' of out-of-state liquor prices." (App., p. 12a) In concluding that the practical effect of New York's prospective statute was to interfere with the freedom of suppliers in their operations in other states to lower prices in response to competitive forces there and that "[t]hus New York has 'project[ed] its legislation' into other States, and directly

regulated commerce therein . . .," the Court indicated that the principles articulated in *Brown-Forman* are not confined to prospective affirmation requirements:

> While we hold that New York's prospective price affirmation statute violates the Commerce Clause, we do not necessarily attach constitutional significance to the difference between a propective statute and the retrospective statute at issue in *Seagram*. Indeed, one could argue that the effects of the statute in *Seagram* do not differ markedly from the effects of the statute at issue in the present case. . . . Because no such statute is before us now, we need not consider the continuing validity of *Seagram*.

476 U.S. 584 n.6.

Not only the trial court's findings of fact but the Sixth Circuit's conclusions that the evidence confirms the effect of affirmation in increasing out-of-state prices, impairing the ability of suppliers to price responsively to the differing competitive forces unique to each market, and depriving consumers in other states of the lower prices otherwise possible in the competitive circumstances of their markets make it clear that the decision below upholding the Tennessee statute is in conflict with the rationale of this Court's decision in *Brown-Forman*. Patently, based upon the principles articulated and the decisions of this Court cited in *Brown-Forman*,[6] "the 'practical effect' of the [Tennessee

6. *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935); *Southern Pacific Co.* v. *Arizona ex rel. Sullivan*, 325 U.S. 761 (1945); *Shafer* v. *Farmers Grain Co.*, 268 U.S. 189 (1925); *Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978); *Edgar* v. *MITE Corp.*, 457 U.S. 624 (1982); *New England Power Co.* v. *New Hampshire*, 455 U.S. 331 (1982); *Schwegmann Bros. Giant Super Mkts.* v. *Louisiana Milk Comm'n*, 365 F. Supp. 1144 (M.D. La. 1973), *aff'd*, 416 U.S. 922 (1974).

statute] is to control liquor prices in other states" and to establish "simple economic protectionism." *Id.* at 583.

The Sixth Circuit's reliance upon the Twenty-first Amendment is also misplaced where the practical effect of an affirmation statute is the extraterritorial regulation of prices in other states and the achievement of economic protectionism. Such reliance upon the Amendment conflicts with this Court's reasoning in *Brown-Forman*. The Court held there that the Amendment could not immunize the New York statute's control of pricing in out-of-state transactions. 476 U.S. at 585. See, also, *Bacchus*, *supra*, 468 U.S. 263.

II.

The Sixth Circuit's Decision That The Tennessee Affirmation Statute Does Not Violate The Commerce Clause Conflicts With The Decision Of The Second Circuit in *Healy II*, As To Which This Court Has Noted Probable Jurisdiction

In *The Beer Institute* v. *Healy*, 849 F.2d 753 (2d Cir. 1988) ("*Healy II*"), the Second Circuit held unconstitutional on its face a contemporaneous affirmation requirement for beer enacted by Connecticut after its earlier prospective statute was overturned in *Healy I*. The amended statute imposed absolutely no prerequisite to lowering prices at any time in other states below those posted and then being charged in Connecticut. That Connecticut statute clearly did not "make it illegal to reduce out-of-state prices," and the Second Circuit's holding that the statute directly regulated beer prices in other states in violation of the Commerce Clause conflicts with the decision below by the Sixth Circuit.

The amended Connecticut statute continued the previous price-posting requirement that, as a condition to selling beer to Connecticut wholesalers, a schedule effective for each calendar month had to be filed and adhered to throughout the month. The amended statute, however, provided that for affirmation purposes the lowest price charged to any wholesaler in the three bordering states was to be determined at the time of filing. 849 F.2d at 754-755. Even though brewers had to adhere in Connecticut to their posted prices for the full calendar month, the amended statute expressly provided that they were not prohibited from changing their prices in other states "at any time during the calendar month covered by such posting" in Connecticut, and that was confirmed by an administrative ruling. *Id.* at 755-756.

Thus the amended Connecticut statute allowed price reductions at any time in other states without requiring that higher prices posted and charged in Connecticut be lowered to the same level.[7] Connecticut required only that the price posted and charged there each calendar month be as low as the lowest price in its three bordering states at the instant prices were filed in the preceding month. That price might or might not be the lowest price charged in those states by the brewer during either the month it was

7. As the Second Circuit stated,

> [The Connecticut amended statute] mandates only that the brewer in a sale to a Connecticut wholesaler not exceed its previously posted price in Connecticut, but that a sale at a price lower in a border state, during the calendar month covered by such posting, does not contravene this section . . . . Thus under the new affirmation scheme an out-of-state shipper is free to lower any border state price below the previously affirmed Connecticut price.

849 F.2d at 756.

posted or the following month in which it was in effect and had to be adhered to in Connecticut.

The Tennessee statute, by contrast, interferes far more with the freedom of suppliers to lower their prices elsewhere in response to differing competitive conditions. Even with no price-posting and adherence requirement, Tennessee effectively requires that suppliers' prices to wholesalers there perpetually must be the lowest charged anywhere. That more restrictive result follows from the requirement that the price on every sale must be the lowest anywhere else " 'at the very time of sale to a Tennessee wholesaler.' " (App., p. 4a, n.3)

Notwithstanding the fact that the amended Connecticut statute left brewers free at any time to lower their out-of-state prices below those posted and being charged in Connecticut, the Second Circuit held that, on its face, the statute's contemporaneous "price affirmation provisions directly regulate interstate commerce in violation of the Constitution." 849 F.2d at 758. Relying upon *Brown-Forman*, the court declared:

> The Supreme Court has emphasized that whether the regulation is direct or indirect, "the critical consideration is the overall effect of the statute on both local and interstate activity," . . . and the interaction of the statute with the regulatory schemes of neighboring states constitutes an "overall effect" which is appropriately considered.[8]

8. In *Brown-Forman*, one of several illustrations of the inevitable and impermissible effects apparent on the face of New York's statute that the Court noted was the "ease with which New York's lowest-price regulation can interfere with a distiller's operations in other States" because its interaction with the different regulatory schemes of those other states could impose conflicting or inconsistent obligations. 476 U.S. at 583-584.

Id. at 758. (Citations omitted) Considering the effect upon the brewers' pricing decisions of the interaction between Connecticut's affirmation statute and the price regulations of the border states, the *Healy II* court concluded, even without considering the issue of economic protectionism, that

> the realities of beer price regulation in the border state area show that Connecticut's statute inevitably exercises control over "the prices set for sales occurring wholly outside its territory," [citing *Healy I*. 692 F.2d at 282].

Id. at 757-758.

Analyzing the price regulations of states bordering Connecticut, the Second Circuit concluded that in practical effect brewers were not free to set their prices in Massachusetts, New York and Rhode Island in terms of the competitive market realities there. Instead, the brewers' pricing decisions in those states had to be made in contemplation of the effect of the Connecticut affirmation requirement. In setting prices in those states, the brewers had to "look ahead," recognizing that their pricing decisions in other states had to be their decision for Connecticut as well. They could "undertake competitive pricing based on the market realities of either Massachusetts or Connecticut, but not both, because the Connecticut statute ties pricing to the regulatory schemes of the border states." *Id.* at 758-760.

To the extent that the amended Connecticut statute thus inevitably interfered with the brewers' competitive responses to what the market forces unique to each market, in or out of Connecticut, would otherwise dictate, so does the Tennessee statute require wine and spirits suppliers to compromise and dilute their pricing decisions to accommo-

date regulatory requirements rather than react solely to differing competitive forces. The Sixth Circuit's decision, in disregarding these controlling considerations, squarely conflicts with that of the Second Circuit in *Healy II*.

On November 14, 1988, the Court noted probable jurisdiction in *Healy II* (*Healy* v. *The Beer Institute*, No. 88-449 and *Wine and Spirits Wholesalers of Connecticut, Inc.* v. *The Beer Institute*, No. 88-513).

III.

The Decision Of The Sixth Circuit Raises Important Issues Affecting The Adoption Of Affirmation Requirements In States Other Than Just Tennessee, Pending Cases In Federal And State Courts, Effective Price Competition In The Alcoholic Beverage Industries, And The Current Viability Or Applicability Of *Seagram*—Issues Which Require Resolution By This Court

While some states stopped enforcing their affirmation statutes after the Court's decision in *Brown-Forman*, at least eight still impose affirmation requirements on one or more types of alcoholic beverages.[9] As the proliferation of affirmation statutes adopted by more than twenty states following New York's enactment of the pioneer statute reviewed in *Seagram* demonstrates, the lowest-price affirmation concept is one of substantial political appeal. As shown by Connecticut's enactment of its amended beer affirmation statute after its prospective statute was struck down in *Healy I*, if any form of affirmation can withstand constitu-

9. Arizona, California, Connecticut, Florida, Georgia, Oklahoma, Rhode Island, and Tennessee.

tional muster then the adoption of such requirements by many if not all of the approximately thirty open states is likely.

In the highly regulated alcoholic beverage industries, the extraterritorial impact of affirmation interacts with and affects the compatibility of the differing regulatory systems of the various states. As the Court noted in *Brown-Forman*, affirmation laws increase the likelihood that suppliers will be subjected to inconsistent obligations in different states resulting in interference with their operations in states other than just the regulating state. 476 U.S. at 583.

The constitutionality of affirmation provisions has been a recurring issue before this Court and others. The Court's noting probable jurisdiction in *Healy II* attests to the continuing importance of the issue. The conflict between the decision of the Second Circuit there and the determination of the Sixth Circuit in this case demonstrates that, even after *Brown-Forman*, confusion still exists as to the current viability of *Seagram* or the scope of its application to affirmation statutes other than those which impose prospective requirements. That confusion is evidenced by the differing views which have been expressed by the lower federal courts in cases decided since *Brown-Forman* and *Healy I*.[10] Apart from *Healy II* and this case, other pending litigation

10. *See Brown-Forman Corp.* v. *South Carolina Alcoholic Beverage Control Comm'n*, 643 F. Supp. 943 (D.S.C. 1986); *Brown-Forman Corp.* v. *Delaware Alcoholic Beverage Control Comm'n*, No. 87-20 LON (D. Del. Dec. 17, 1987); *Brown-Forman Corp.* v. *New Mexico Dep't of Alcoholic Beverage Control*, 672 F. Supp. 1383 (D.N.M. 1987); *United States Brewers Ass'n* v. *Healy*, 669 F. Supp. 543 (D. Conn. 1987), *rev'd sub nom. The Beer Institute* v. *Healy*, 849 F.2d 753 (2d Cir. 1988).

will be determined on the issue of the constitutionality of affirmation requirements.[11]

Alcoholic beverage sales at wholesale substantially exceed 25 billion dollars a year annually. If conflict and uncertainty as to the validity of the affirmation concept continue, if the decision below by the Sixth Circuit stands, and if more states are thus encouraged to enact affirmation laws, billions of dollars of alcoholic beverage sales each year are likely to become subject to a kind of monolithic, uniform and inflexible price regulation which will tend to set a common floor below which prices cannot respond to free market forces, including markedly differing competitive exigencies varying from state to state.

Such undesirable price regulation does not promote temperance or any other goal properly related to the Twenty-first Amendment. Instead, it is designed only to achieve economic protectionism by assuring price parity to the residents of each regulating state while denying to those in other states the possibility of lower prices resulting from different competitive forces there.

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11. Brown-Forman is challenging the constitutionality of Florida's retrospective affirmation statute in a declaratory judgment action brought in the Northern District of Florida. *Brown-Forman Corp.* v. *Daniel J. Bosanko, Director, and the Division of Alcoholic Beverage Control and Tobacco of the Department of Business Regulation of the State of Florida,* N.D. Fla., Tallahassee Div., Civ. No. 87-40321-MP. In *United States Brewers Ass'n* v. *Director of the New Mexico Dep't of Alcoholic Beverage Control,* No. SF 79-1139(C), pending in the First Judicial District, County of Santa Fe, State of New Mexico, the State is claiming $12 million in damages and $5 million in interest for alleged violation of its affirmation statutes by The Stroh Brewery Company.

Conclusion

For these reasons, Brown-Forman urges that this petition for certiorari should be granted.

Respectfully submitted,

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February 1, 1989

APPENDIX

Opinion Of The United States Court Of Appeals For The Sixth Circuit

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 87-5870/5913

BROWN-FORMAN CORPORATION,
Plaintiff-Appellee,

v.

TENNESSEE ALCOHOLIC BEVERAGE COMMISSION, et al.,
Defendants-Appellants
(87-5913),

LICENSED BEVERAGE WHOLESALERS OF TENNESSEE,
Intervenor-Appellant
(87-5870).

On Appeal from the United States District Court
for the Middle District of Tennessee.

Decided and Filed November 4, 1988

Before: KRUPANSKY and NELSON, Circuit Judges, and HACKETT, District Judge.*

DAVID A. NELSON, Circuit Judge. The laws of the State of Tennessee prohibit any distiller from making a sale of

* The Honorable Barbara Hackett, United States District Judge for the Eastern District of Michigan, sitting by designation.

alcoholic beverages to a wholesaler in Tennessee at a price higher than that being charged, contemporaneously with the Tennessee sale, to a wholesaler in any other state. Tenn. Code Ann. § 57-3-202(e). The Tennessee statute leaves distillers free to change their out-of-state prices at will, without notice and without the approval of any Tennessee official.

Plaintiff Brown-Forman Corporation, a distiller and national marketer of alcoholic beverages, brought the present action to obtain a declaratory judgment on the constitutionality of the Tennessee statute. In *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573 (1986), the Supreme Court had recently invalidated a New York liquor-pricing statute which was geared to out-of-state prices that had to be certified in advance, and which made it illegal to change the out-of-state prices without New York's approval. Relying principally upon that decision, the district court held that on its face the Tennessee statute violates the Commerce Clause of the United States Constitution.[1] In our opinion, however, the Tennessee law lacks the obvious extraterritorial reach that the New York statute had, and we do not believe the Tennessee statute runs afoul of the negative implications of the Commerce Clause. We are strengthened in this conclusion by the implications of the Twenty-first Amendment, with its constitutional prohibition against the transportation of intoxicating liquors into any state for use in that state "in violation of the laws thereof."

1. The district court did not use the phrase "dormant Commerce Clause," but might well have done. The court believed that the Tennessee statute affects interstate commerce in a way violative of what Mr. Justice Frankfurter called the "negative implications" of the constitutional grant to Congress of the power to regulate commerce among the several states. Extraterritorial legislation is often said to violate the Commerce Clause in its negative, or "dormant," aspect.

I

In considering whether the Tennessee liquor-pricing law goes further than the Constitution allows, it is important to understand not only what the law says, but also what it does not say. Unlike the "affirmation" laws of many other states, the Tennessee statute does not require distillers to affirm that they will comply with price schedules posted in advance.[2] The Tennessee statute does not require any posting of prices, it does not impose any waiting period before prices can be changed. It does not purport to control the timing or amount of out-of-state price changes. And it does not require that governmental approval be obtained before prices are changed within the state, just as it does not require governmental approval before prices are changed outside the state.

All the Tennessee statute does, in essence, is tell distillers that when they sell or offer to sell liquor to a wholesaler in Tennessee, they may not willfully charge or quote a price in excess of any wholesale price currently being charged or quoted by the distiller outside the state. The mechanism by which Tennessee guards against such price discrimination is as follows:

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2. A recent student law review note says that "[a]ll affirmation statutes begin by requiring producers to file monthly schedules listing the prices they will charge distributors in the state during the upcoming month." Note, "Liquor Price Affirmation Statutes and the Dormant Commerce Clause," 86 Mich. L.Rev. 186, 190 (1987). The Tennessee statute is an affirmation statute, but it imposes no such requirement. The Note argues that "*all* liquor price affirmation statutes violate the commerce clause." *Id.* at 188. The faulty premise may be immaterial as far as the affirmation laws of many states are concerned—see, *e.g.*, *In re The Beer Institute*, 849 F.2d 753, 760 (2d Cir. 1988), where the Note is cited in connection with a Connecticut statute that did require advance posting of price schedules—but the Note's argument is not to be accepted uncritically in the case of Tennessee.

— Before offering any brand of alcoholic beverage for sale to any licensed wholesaler in Tennessee, every manufacturer, distiller, broker, or vintner of any such beverage is required to file with Tennessee's Alcoholic Beverage Commission an "affirmation of corporate policy." Tenn. Code Ann. § 5703-202(e)(1).

— The "affirmation of corporate policy" must certify that the seller will "not willfully sell or offer for sale any alcoholic . . . beverages of a particular brand, proof or size, in Tennessee at a price higher than the price [at which] such liquors are sold or offered for sale to licensed wholesalers in any other state in the United States," *Id.*, Subsection (2).[3]

— The term "price" is defined as "platform price at the distillery." Price differentials based on transportation costs are expressly allowed, as are nondiscriminatory quantity discounts. *Id.*, Subsection (3). The Alcoholic Beverage Commission also interprets the statute as allowing "promotional discounts"—no-strings credits given to the wholesaler for promotion of the distiller's brands.

— The making of a false affirmation, the failure to file a required affirmation, or the willful violation of the pledges contained therein, may be punished as a misdemeanor and may result in suspension or revocation of the privilege to import and sell alcoholic beverages in Tennessee. *Id.*, Subsections (4) and (5).

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3. The Tennessee Attorney General has ruled that this is a "contemporaneous affirmation requirement" which "means that a supplier must affirm that its prices are no higher than its prices elsewhere *at the very time of sale to a Tennessee wholesaler.*" Tennessee Attorney General Opinion 86-147, p.5. (Emphasis supplied.)

The Tennessee statute was enacted in 1975. In June of 1986 the United States Supreme Court handed down its decision in *Brown-Forman, supra,* 476 U.S. 573. The following month Brown-Forman sent the Tennessee Alcoholic Beverage Commission a two paragraph letter stating, in pertinent part:

> "The U.S. Supreme Court's recent decision *(Brown-Forman Distillers Corporation v. New York State Liquor Authority* No. 84-2080, decided June 3, 1986) declaring New York's affirmation statute unconstitutional is applicable to the affirmation law of *all* states and, accordingly, the existing affirmation is hereby withdrawn." (Emphasis in original.)

The Commission forwarded the letter to the Attorney General of Tennessee, requesting an opinion on the issue raised by Brown-Forman. The Attorney General responded with a seven-page opinion letter explaining why Tennessee's statute is distinguishable from New York's and concluding that the Tennessee statute does not contravene the Commerce Clause. The Commission accepted the Attorney General's conclusion, and Brown-Forman was so advised.

Brown-Forman thereupon sued the Commission in the United States District Court for the Middle District of Tennessee, asserting that Tenn. Code Ann. § 57-3-202(e) is unconstitutional and requesting declaratory and injunctive relief. After a two-day trial the district court filed a memorandum opinion holding the statute "facially unconstitutional because of its effect on interstate commerce." The opinion was accompanied by an order permanently enjoining enforcement of the statute. This appeal followed.

II

Whatever the effect on interstate commerce of a state statute prohibiting sales of liquor at discriminatory prices, it could hardly be more direct or more profound than the effect of prohibiting sales of liquor altogetehr. No state currently does that—notwithstanding William Allen White's tongue-in-cheek prediction that "Kansans will vote dry as long as they can stagger to the polls"—but under the second section of the Twenty-first Amendment,[4] every state may do so. The negative implications of the Commerce Clause notwithstanding, every state has "virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980). The Twenty-first Amendment thus "directly qualifies the federal commerce power," as the Supreme Court recently noted, despite the fact that "the Court has rejected the view 'that the Twenty-first Amendment has somehow operated to "repeal" the Commerce Clause wherever regulation of intoxicating liquors is concerned.' " *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 346 (1987), quoting *Hostetter v. Idlewild Liquor Corp.*, 377 U.S. 324, 331-32 (1964). (What the *Idlewild* case made clear, as Mr. Justice Stewart said in *Joseph E. Seagram & Sons. Inc. v. Hostetter*, 384 U.S. 35, 42 (1966), was that "the Twenty-first Amendment has not operated totally to repeal the Commerce Clause in the area of the regulation of traffic in liquor.")

Even where products other than liquor are concerned, state regulation that falls short of complete prohibition does

4. "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

not necessarily impose an impermissible burden on interstate commerce merely because it discourages some out-of-state manufacturers from selling within the state, to the injury of the consuming public. *Exxon Corp. v. Maryland*, 437 U.S. 117, 127-28 (1978). But even in the case of alcoholic beverages, no state is entitled to regulate sales in other states. It is not up to Tennessee to decide whether the sale and consumption of liquor will be prohibited in Kentucky, for example. Whether extraterritorial regulation is ruled out by the negative implications of the Commerce Clause or by "the structure of the Constitution as a whole," as Professor Donald H. Regan argues in his "Siamese Essays," 85 Mich. L. Rev. 1865 and 1884 (1987), it is well settled that although a state "may regulate the sale of liquor within its borders, and may seek low prices for its residents, it may not 'project its legislation into [other States] by regulating the price to be paid for liquor in those States.'" *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 582-83, 90 L.Ed.2d 552, (1986) (quoting *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521 (1935)).

First and foremost among the questions presented in the case at bar, then, is whether Tennessee has projected its legislation into other states by "regulating" the price to be paid for liquor there. If it has, the district court was correct in holding the legislation unconstitutional.

III

At trial, Brown-Forman presented evidence characterized by the district court as suggesting that Tennessee's statute "distorts the market forces of supply and demand, prevents the use of aggressive price promotion as a market-

ing tool to attain profit maximization and also impairs the ability to introduce new products in other states." A witness for Brown-Forman maintained that it "was rarely a feasible option" for the company to try to improve out-of-state sales of a slow-moving item by cutting out-of-state prices, because the Tennessee statute would require a corresponding cut in prices in Tennessee even if the item should already be selling well in Tennessee.

The evidence presented by Brown-Forman did not quantify the market distortions attributed to the Tennessee statute. In terms of dollars and cents, both the practical effect of the statute on Brown-Forman's bottom line and the practical effect of the statute on the pocketbooks of consumers within and without the state remain unknown. The district court thought it clear, nonetheless, that the inevitable tendency of the Tennessee statute would be to control prices in other states:

> "It is clear that if a liquor distiller, such as plaintiff, desires to raise its prices in Tennessee, it must raise its price first in every other state in which the product is sold. Tennessee's affirmation statute works to deny consumers in other states the benefits of a free competitive market. . . ."

This is the basis for the district court's conclusion that the statute is unconstitutional.

IV

We agree with the district court that if a distiller desires to raise prices in Tennessee, the statute clearly prevents that desire from being gratified unless prices are raised simultaneously wherever the product in question is being sold outside the state. But paraphrasing an observation

made by Mr. Justice Stewart in *Seagram*, "[i]t is by no means clear . . . that [Tenn. Code Ann. § 57-3-202(e)] must inevitably produce higher prices in other States . . . rather than the lower prices sought for [Tennessee]." 384 U.S. at 43. It is impossible to tell from the record of this case to what extent Brown-Forman may actually have raised out-of-state prices in order to indulge a desire to raise prices in Tennessee, just as it is impossible to determine to what extent Brown-Forman may actually have refrained from lowering prices outside Tennessee in order to avoid having to lower prices within Tennessee. Nevertheless, if the price elasticity of demand for different types of liquor varies significantly in different parts of the country—and the record suggests that it probably does—we agree that the natural tendency of the Tennessee statute is to impair the efficiency of the interstate liquor market and to deprive consumers of the benefits, if that is the word of access to the most liquor for the least money.

As noted above, however, such market distortions would not necessarily mean that the statute is unconstitutional, even if the products in question were not covered by the Twenty-first Amendment. See *Exxon Corp. v. Maryland, supra*, 437 U.S. 117. "The mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not within the domain which the Constitution forbids." *Osborn v. Ozlin*, 310 U.S. 53, 62(1940). And the Tennessee statute has not been shown likely to produce greater distortions in the interstate market than would a statute prohibiting Tennessee liquor sales altogether.

The question before us is not whether Tennessee's liquor-pricing statute is likely to have "repercussions" on liquor prices in other states, but whether Tennessee has

actually undertaken to "regulate" liquor prices in other states, See *Brown-Forman,* 476 U.S. at 580, where the Court, speaking through Justice Marshall, said that the inquiry "must center on whether New York's affirmation law *regulates* commerce in other States." (Emphasis supplied.)

In *Brown-Forman,* the distiller argued that the New York statute not only tended to make it more costly to reduce prices in other states, but actually "makes it *illegal* for a distributor to reduce its price in other states during the period that the posted New York price is in effect." *Id.* at 579-80. (Emphasis supplied.) The Supreme Court agreed that this was precisely how the New York statute worked, and the Court held, not surprisingly, that a statute making it illegal to reduce out-of-state prices is a statute that "directly regulates" such prices in violation of the Constitution:

> "Once a distiller has posted prices in New York, it is not free to change its prices elsewhere in the United States during the relevant month.[5] Forcing a merchant to seek regulatory approval in one State before undertaking a transaction in another directly regulates interstate commercie." 476 U.S. at 582.*
>
> "[5] The Liquor Authority may 'for good cause shown' permit a distiller to change its prices dur-

* In *Brown-Forman Corp. v. South Carolina Alcoholic Beverage Control Commission,* 643 F.Supp. 943 (D.S.C. 1986), the South Carolina district court read the Supreme Court's *Brown-Forman* decision as requiring the invalidation of a South Carolina statute that bore little resemblance to New York's, but was essentially identical to Tennessee's. The district court seems to have interpreted *Brown-Forman* as teaching that where a price affirmation statute has the effect of making out-of-state price cuts costlier to the distiller, the statute is unconstitutional even though it does not make such price cuts illegal, as the New York statute did. We disagree with the district court's interpretation, which seems to deprive the Supreme Court's holding in *Seagram* of all meaning. The district court's decision was not appealed, so we do not know where the Court of Appeals for the Fourth Circuit would have come out on this question.

> ing a particular month, ABC Law § 101-b(3)(a). and New York speculates that the Authority would permit a distiller to lower its prices in other States in a given month so long as the distiller also lowers them in New York. However, whether to permit such a deviation from the statutory scheme is a matter left by the statute to the discretion of the Liquor Authority.
>
> We would not solve the constitutional problems inherent in New York's statute by indulging the dissent's assumption that the Authority will be sensitive to Commerce Clause concerns. Certainly New York could not require an out-of-state company to receive a license from New York to do business in other States, even if we were quite sure that such licenses would be granted as a matter of course. Similarly, New York simply may not force appellant to seek regulatory approval from New York before it can reduce its prices in another State. The protections afforded by the Commerce Clause cannot be made to depend on the good grace of a state agency."

The case at bar presents a very different situation from that presented in the Supreme Court's *Brown-Forman* case. Here the distiller is not arguing that the statute in question makes it "illegal" for a distiller to reduce its prices in other states without permission, and there is no conceivable basis on which a court could attribute such an effect to the Tennessee statute. All the distiller can argue here is that the Tennessee statute tends to discourage out-of-state price reductions—because such price reductions must be replicated in Tennessee—just as the statute tends to encourage price increases outside Tennessee, because Tennessee prices

cannot be raised without raising foreign prices as well. Price moves as such are not illegal anywhere, as far as Tennessee is concerned, although they may be more costly, from the distiller's standpoint, than they would be in the absence of the statute.

V

The teaching of the Supreme Court's decision in *Seagram,* as we understand it, is that a tendency to increase the distiller's out-of-state costs is simply not enough to convert an otherwise constitutional state liquor law into an impermissible "regulation" of out-of-state liquor prices.

Seagram dealt with a New York statute that required distillers and other owners of liquor brands to file monthly price schedules accompanied by an affirmation that the price of each item listed on the schedule was "no higher than the lowest price at which such item of liquor was sold by such brand owner . . . to any wholesaler anywhere in any other state . . . at any time during the calendar month immediately preceding the month in which such schedule is filed," Chapter 531, 1964 Session Laws of New York § 9, as quoted in *Seagram,* 384 U.S. at 350. The New York statute was thus more restrictive than the Tennessee statute. Under the New York statute a distiller could not lower wholesale prices anywhere outside New York without locking itself into a correspondingly low price in New York for all of the next month, while the Tennessee law has no comparable effect. If the New York statute did not constitute "regulation" of out-of-state prices, therefore, it follows *a fortiori* that the Tennessee statute does not constitute such regulation.

The Supreme Court recognized in *Seagram,* just as it did in *Brown-Forman,* "that the most important issue was

whether the statute regulated out-of-state transactions." *Brown-Forman*, 476 U.S. 581, referring to *Seagram*, 384 U.S. at 42-43. And the Supreme Court concluded, in *Seagram*, that

> "The mere fact that § 9 is geared to appellants' pricing policies in other States is not sufficient to invalidate the statute. As part of its regulatory scheme for the sale of liquor, *New York may constitutionally insist that liquor prices to domestic wholesalers and retailers be as low as prices offered elsewhere in the country.*" (Emphasis supplied.)

If *Seagram* is still good law, this means that Tennessee "may constitutionally insist that liquor prices to domestic wholesalers . . . be as low as prices offered elsewhere in the country." That, and nothing more than that, is what Tennessee has done in the statute before us.

While the natural tendency of the New York law to increase out-of-state costs would seem to have been just as apparent on its face as is the corresponding tendency of the Tennessee statute, the *Seagram* opinion does mention that the actual effects of the New York statute on the distiller's business outside the state were "largely matters of conjecture." The court noted that it would be time enough to assess the actual effects of the New York law "when a case arises that clearly presents them." 384 U.S. at 43. *Seagram* was not that case, and the court merely held that the statute was not unconstitutional on its face.

The record in the case at bar confirms that the natural tendency of the Tennessee statute is to increase costs outside of Tennessee, but like the record in *Seagram*, it does not quantify the costs involved. Perhaps this is one of the

reasons why the district court thought that the issue before it was "whether the [Tennessee] affirmation statute, *on its face,* violates the Commerce Clause of the United States Constitution." (Emphasis supplied.) In holding that the Tennessee statute does, "on its face," violate the Commerce Clause, the district court gave an answer diametrically opposed to the answer given by the Supreme Court in *Seagram.*

VI

It is true, as the Court of Appeals for the Second Circuit recently had occasion to observe, that the Supreme Court's opinion in *Brown-Forman,* and Justice Blackmun's concurrence in that case, have "cast doubt upon the continuing validity of the principles underlying *Seagram.*" *In re The Beer Institute,* 849 F.2d 753, 760 (2d Cir. 1988). It is also true, however, that courts of appeals "are not empowered to overrule Supreme Court precedent." *Id.* Only the Supreme Court can do that—and the last time the Supreme Court had an opportunity to overrule *Seagram,* it declined to do so. Because a *Seagram*-like statute was not before the Court in *Brown-Forman,* the *Brown-Forman* court simply said that "we need not consider the continuing validity of *Seagram.*" *Brown-Forman,* 476 U.S. 584 n.6.

On its face, the Tennessee statute seems calculated to affect interstate commerce less drastically than the statute that was upheld in *Seagram.* If the Supreme Court should wish to decide whether *Seagram* is still valid, therefore, this would probably be a good case in which to do it. If not, we assume that lower courts ought to follow *Seagram* in every case to which that decision obviously applies.

The Second Circuit's interpretation of the *Seagram* decision does not necessarily differ from ours. See *United*

States Brewers Association, Inc. v. Healy, 692 F.2d 275, 283-84 (2d Cir. 1982), *affirmed without opinion*, 464 U.S. 909 (1983):

> "Given the latitude allowed a state under the Twenty-first Amendment to regulate the sale of liquor within its own borders, the holding in *Seagram* might well validate . . . a requirement simply that a brewer set its Connecticut prices at the lowest levels it chooses to set in the surrounding states see 384 U.S. at 43-45, 86 S.Ct. at 1260-1261, leaving those out-of-state prices unregulated by Connecticut. But nothing in *Seagram* purports to rule that a state may achieve its goal of price-parity by the far more drastic, and clearly excessive method of controlling the minimum prices at which liquor may be sold outside of its own territory.'

The Connecticut statute that was held unconstitutional in *Healy* told a brewer "that for any given month when it sells beer to a wholesaler in Massachusetts, in New York or in Rhode Island, it may not do so at a price lower than that it has previously announced it will charge to Connecticut wholesalers." *Id.* at 282. The Tennessee statute, in contrast, exercises no control over out-of-state prices; it simply requires that a distiller set its Tennessee prices at the lowest levels it chooses to set in other states. That requirement, as the Second Circuit acknowledged, "may well' be validated by the holding in *Seagram*.

The Connecticut statute considered by the Second Circuit in *Beer Institute* was an amended version of the one invalidated in *Healy*. The Connecticut legislature had attempted to fix the statute up along the lines laid out in *Healy*, but the court thought the job had been bungled. *Beer Institute*, 849 F.2d at 755-56. Read in conjunction with the liquor laws

of the surrounding states, the Connecticut statute still exercised control, "inevitably," over out-of-state prices. *Id.* at 758. The *Beer Institute* court declined "to *extend* the *Seagram* precedent to validate a simultaneous affirmation provision that, by its purposeful interaction with border-state regulatory schemes, operates to control prices beyond Connecticut's borders." *Id.* at 760-61.

VII

In the case at bar there has been no claim that the Tennessee affirmation statute was designed to interact with the statutes of other states in such a way as inevitably to control prices beyond Tennessee's borders. What Brown-Forman told the Tennessee Alcoholic Beverage Commission, indeed, was that the *Brown-Forman* decision made "the affirmation law[s] of *all* states" unconstitutional.

If the interaction of Tennessee's law with the laws of the other states should somehow create an extraterritoriality problem, moreover, the fault would not necessarily be Tennessee's, as opposed to being the fault of the other states. In other contexts, the Supreme Court has resolved such questions by resort to an "internal consistency" test reminiscent of Kant's categorical imperative; what would the effect be, the Court asks, if the statute under consideration were adopted in identical form by all states? See *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159, 169 (1983). If the results of such universal adoption would be unacceptable the statute may not pass constitutional muster.

Tennessee statute would pass the "internal consistency" test without difficulty. If every state adopted a liquor pricing statute identical to Tennessee's, market forces might, to be sure, be distorted enough to make Adam Smith turn in

his grave. But "[t]he Constitution does not require the States to subscribe to any particular economic theory," *CTS Corp. v. Dynamics Corp. of America*, 481 U.S.—,—, 95 L.Ed.2d 67, 87 (1987), and with universal adoption of laws such as Tennessee's, no state would be forbidding any distiller to reduce its prices in any foreign state. Perhaps an out-of-state price cut would cost the distiller more than it would in a free market, but, under uniform affirmation laws identical to Tennessee's, no such price cut would be illegal.

VIII

The plaintiffs in *Beer Institute* raised an "economic protectionism" issue that the Second Circuit found it unnecessary to reach in view of its holding that the Connecticut statute "inevitably exercise[d] control" over out-of-state prices and thus constituted a direct regulation of interstate commerce. 849 F.2d at 757-58. Brown-Forman contends here, as it contended in its challenge to the New York statute, that a law which disadvantages consumers in other states represents "the sort of 'simple economic protectionism' that [the Supreme Court] has routinely forbidden." *Brown-Forman*, 476 U.S. at 580, quoting *Philadelphia v. New Jersey*, 437 U.S. 617, 524 (1978). Where the Twenty-first Amendment is concerned, however, the short answer to this argument would seem to be that *Seagram* expressly rejected it: "As part of its regulatory scheme for the sale of liquor, [a state] *may* constitutionally insist that liquor prices to domestic wholesalers and retailers be as low as prices offered elsewhere in the country." *Seagram*, 384 U.S. at 43. (Emphasis supplied.) There has been no showing here that the Tennessee statute "disadvantages"

out-of-state consumers any more than the statute upheld by the Supreme Court in *Seagram* did. As a Tennessee distiller, moreover (see note 6, *infra*), Brown-Forman can hardly contend that the statute is unconstitutional because it treats local distillers more favorably than foreign distillers. *Cf. Bacchus Imports Limited v. Dias*, 468 U.S. 263 (1984).

IX

We note, finally, that in the post-*Brown-Forman* case of *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. —, 95 L.Ed.2d 67 (1987), the Supreme Court declared that "[t]he principal objects of dormant Commerce Clause scrutiny are statutes that discriminate against interstate commerce." 481 U.S. at—, 95 L.Ed.2d at 84. In this connection the Supreme Court referred with evident approval to Professor Regan's article at 84 Mich. L. Rev. 1091 (1986) on "The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause," *Id.*

Seagram teaches that statutes comparable to Tennessee's do not, on their face, "discriminate" against interstate commerce,[6] and Professor Regan—who has said that he is "inclined to think the Court was right" in *Brown-Forman*— also thinks that the type of retrospective affirmation laws upheld in *Seagram* "do not violate the extraterritoriality principle." Regan, "Siamese Essays," 85 Mich. L. Rev. at 1903, 1905.

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6. See also *Exxon Corp. v. Maryland*, 437 U.S. at 125-26. Just as in-state gasoline dealers had no competitive advantage over out-of-state dealers under the Maryland statute that was upheld in *Exxon*, in-state distillers have no competitive advantage over out-of-state distillers under Tennessee's affirmation statute. And, as Brown-Forman's complaint in this case discloses, Brown-Forman happens to *be* an in-state distiller. Brown-Forman is a Tennessee corporation, and readers of the company's magazine advertising may recall that Brown-Forman's Jack Daniel distillery is located in Lynchburg, Tennenessee.

Neither we presume, would Professor Regan consider such statutes impermissibly "protectionist." See 84 Mich. L. Rev. at 1244, where, in discussing Justice Marshall's opinion in *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981). Regan suggests that the Montana statute at issue in *Commonwealth Edison* does not even have a protectionist effect, much less a protectionist purpose, because "[n]o local economic factor is favored, even in the effect of the statute, vis-a-vis any foreign competitor." Precisely the same thing can be said of Tennessee's affirmation statute—and if Professor Regan is a reliable guide, there is no reason why the author of *Brown-Forman* should have any difficulty in reconciling the opinion in that case with Justice Stewart's opinion in *Seagram*.

If what the Supreme Court is doing, in its dormant Commerce Clause cases, is "preventing state protectionism, where protectionism is defined in terms of purposeful favoring of locals over their foreign competitors," 84 Mich. L. Rev. at 1206 (emphasis omitted), then the Tennessee statute is not endangered, for it is no more a "protectionist" or "discriminatory" statute than it is an extraterritorial one. We need not decide, of course, whether Tennessee's affirmation law could properly serve as a model for legislation aimed at products not covered by the Twenty-first Amendment. Brown-Forman's products *are* subject to the Twenty-first Amendment, and reading *Seagram* and *Brown-Forman* together, we do not see why in-state sales of those products may not be regulated in the way Tennessee has chosen to regulate them.

We are not concerned with the wisdom of Tennessee's law, obviously, but only with its constitutionality. "[A] law can be both economic folly and constitutional." *CTS*

Corp., 95 L.Ed.2d at 90 (Scalia, J., concurring). A law duly enacted by a state legislation with the assent of a state governor or over his veto, ought not to be set aside by an unelected federal judiciary unless the Constitution compels that drastic step.

We think the district court erred as a matter of law in its holding that the Tennessee statute is unconstitutional. The judgment of the district court is REVERSED, and the case is REMANDED with instructions to dissolve the injunction and dismiss the complaint.

Opinion Of The United States District Court For The Middle District Of Tennessee, Nashville Division

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

Docket No. 3-86-0926

BROWN-FORMAN CORPORATION

vs.

THE TENNESSEE ALCOHOLIC BEVERAGE COMMISSION, ET AL.

MEMORANDUM

This action arose out of a complaint, filed October 30, 1986, in which plaintiff Brown-Forman Corporation (hereinafter "Brown-Forman") alleges that Tennessee's affirmation, statute, Tenn. Code Ann. § 57-3-202(e), is in violation of the Commerce Clause of the United States Constitution and, accordingly, seeks a declaratory judgment finding this statute unconstitutional. In addition, plaintiff seeks a permanent injunction enjoining the defendants from enforcing this statute and from taking any action in regard to plaintiff's failure to comply with the statute.

A hearing on plaintiff's initial motion for preliminary injunction was set for December 8, 1986. Prior to the hearing, a motion to intervene was filed by the Licensed Bever-

age Wholesalers of Tennessee (hereinafter "LBWT"), a trade association composed of Tennessee wholesalers who purchase alcoholic beverages from manufacturers and suppliers and then distribute the products to Tennessee retailers. On December 30, 1986, this Court issued an Order permitting LBWT to intervene and denying plaintiff's motion for preliminary injunction. Trial on the merits came on for hearing on February 4 and 5, 1987. This Memorandum constitutes the Court's findings of fact and conclusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure and Rule 12(i) of the Local Rules of Court for the United States District Court for the Middle District of Tennessee.

FINDINGS OF FACTS

Plaintiff Brown-Forman is a Tennessee corporation engaged in the importation, sale and distribution of a variety of alcoholic beverages. Brown-Forman distributes its brands in Tennessee, as well as other states throughout the country. Because Brown-Forman imports alcoholic beverages into Tennessee and sells them, it is subject to section 57-3-202(e). Section 57-3-202(e) requires manufactures [sic], distillers and other producers of alcoholic beverages to file an affirmation statement stating that such party will not willfully sell or offer for sale any alcoholic spirituous beverages or vintage alcoholic beverages at a price higher than the price such liquors are sold or offered for sale to licensed wholesalers in any other state in the United States. Compliance with the affirmation statute is mandatory, and a failure to file the required statement results in the mandatory revocation or suspension of the manufacturer's license to import and sell alcoholic beverages in

Tennessee for a peroid of not less than one year. Tenn. Code Ann. 57-3-203(e)(5).

Plaintiff maintained an affirmation statement on file with the Tennessee Alcoholic Beverage Commission (hereinafter "the Commission") until July 25, 1986. On that date, plaintiff notified the Commission that it was withdrawing its statement. (Complaint, ¶¶ 10, 15). Since there had been no previous violation of the state affirmation law, the Commission had not taken any prior enforcement action nor had it promulgated any interpretative rules or regulations regarding enforcement of the law.

According to the Commission, the purpose of § 57-3-202(e) is to prevent suppliers of alcoholic beverages from discriminating in the price charged to Tennessee wholesalers and the price charged to wholesalers in other states for products of the same quality. (Tr. at 167). Mr. Elyon H. Davis, Director of the Commission testified that over one-half of Tennessee's population resides in counties that border other states and, accordingly, the affirmation statute attempts to prevent Tennessee consumers from crossing state lines and purchasing liquor to bring back into Tennessee for consumption. (Tr. at 168). To ensure this, the statute requires that a supplier's platform price at the distillery, at the time of its sale to a Tennessee wholesaler, be no higher than the platform price charged to wholesalers in other state. (Tr. at 169-170). As defined by § 57-3-202(e)(3), platform price does not include price differentials based on quantity discounts as long as the discount prices are offered to Tennessee wholesalers for purchases in the same quantities.

Brown-Forman supplies its products to approximately 2,000 wholesalers nationwide. (Tr. at 37). Each wholesaler purchases the goods it needs, reflecting its consumers'

demands, and, accordingly, Brown-Forman receives continuous daily orders as each wholesaler attempts to meet it unique needs. (Tr. at 37-38). Brown-Forman maintains records entitled depletion flash reports (hereinafter "depletion reports") that indicate the number of cases of Brown-Forman beverages that a wholesaler sells to a retailer. (Tr. at 9, 13). The depletion reports reflect case sales for Brown-Forman products on a brand by brand basis and details sales made during both monthly and yearly periods. (Tr. at 13, 14). The reports also contain a quota number reflecting the number of sales that Brown-Forman is seeking for each of its brands. (Tr. at 15). Attainment of the quota set by Brown-Forman is highly desirable since state and regional managers are assigned an individual quota and the bonus earned by each manager is tied to whether the quota assigned to a particular state or region is attained. (Tr. at 16).

To insure the accuracy of the depletion reports, Brown-Forman conducts an annual audit of each wholesaler by physically counting the number of cases on hand and then matching the audit report against the depletions (essentially sales) that have been reported by the wholesalers during the fiscal year. (Tr. at 10, 116). After the depletion reports have been submitted for a previous period, the manager of a particular state or territory meets with the general manager of the region and a representative of one of plaintiff company's brands to determine the target sales projection for that particular brand given previous sales, estimates of future market demand, sales promotion activity, pricing adjustments and other factors affecting the market environment. (Tr. at 16, 78).

At trial, plaintiff submitted its December 1987 Depletion Report. (Pltf's Ex. 1). Joseph Flock, executive assistant

to the executive director of sales for Brown-Forman, demonstrated to the Court the substantial regioinal variances in the sales figures of its various brands and how the sales figures affected the projected quota for the coming fiscal year. Mr. Flock testified that the depletion report demonstrated the need to lower the price of certain brands in various markets in order to increase sales and, hopefully, profits. (Tr. at 18-19) Mr. Flock, however, maintained that this was rarely a feasible option given that Tennessee's affirmation statute would require a downward adjustment in the price to Tennessee wholesalers of the same brand if the price in Tennessee was currently higher than the price in the state where incentive pricing was being conducted. (Tr. at 26). Accordingly, plaintiff avers that Tennessee's affirmation statute keeps the price of many slow selling goods artifically high. (Tr. at 28). In gist, plaintiff asserts that the affirmation statute distorts the market forces of supply and demand, prevents the use of aggressive price promotion as a marketing tool to attain profit maximization and also impairs the ability to introduce new products in other states. Plaintiff maintains that the most effective way to successfully introduce a product into a new market is through a price reduction, and although a reduction often is not necessary in Tennessee, it is unavoidable under Tennessee's affirmation statute. (Tr. at 25-26).

The Commission asserts that price discounting is currently available to the plaintiff, through plaintiff's 77-17 promotional allowance program. Under this program, the plaintiff provides unconditional lump sum payments to wholesalers. (Tr. at 21-22). The goal of these payments is the promotion of plaintiff's goods through either advertising or price promotion. (Tr. at 99). Such a program

is not in violation of Tennessee's affirmation statute since they must be made without conditions on how the wholesaler utilizes the funds and, thus, any eventual price reductions are entirely discretionary by the wholesalers.

Brown-Forman contends that the 77-17 program has been very ineffective in marketing plaintiff's brands since the payment cannot be brand specific and since Brown-Forman cannot require the wholesaler to use its funds on its products or require the wholesaler to document and report how the funds are spent. Further, plaintiff notes that even if the wholesaler uses this money to promote Brown-Forman brands, there is no guarantee that the wholesaler will promote the particular brands that plaintiff wishes to promote, or that the designated brands will be promoted at times that coincide with other promotional programs emphasizing particular Brown-Forman brands. (Tr. at 21-22, 83, 98). As a result, plaintiff contends that the 77-17 program is a very inefficient way to promote Brown-Forman products. (Tr. at 127).

LEGAL CONCLUSION

As previously noted, there have been no enforcement actions taken by the Commissioner for violation of Tennessee's affirmation statute nor has the Commission promulgated any interpretative rules or regulations in regard to the statute. As a result, the issue before the Court is whether the affirmation statute, on its face, violates the Commerce Clause of the United States Constiution. The Court holds that the statute in question is facially unconstitutional because of its effect on interstate commerce.

The Supreme Court has adopted a two-tiered approach to analyzing issues concerning the legitimacy of economic

regulation under the Commerce Clause. If the state statute in question directly regulates or discriminates against interstate commerce, or if the effect of the statute works to favor in-state economic interests over out-of-state interests, then the Supreme Court has generally struck down the statute without additional inquiry. *Brown-Forman Distillers Corp v. New York State Liquor Authority*, 106 S.Ct. 2080, 2084 (1986); *Philadelphia v. New Jersey*, 437 U.S. 617, 628, 98 S.Ct. 2531, 2537 (1978); *Shafer v. Farmers Grain Co.*, 268 U.S. 189, 201, 45 S.Ct. 486 (1925). If the statute has only indirect effects on interstate commerce, however, and regulates evenhandedly, then the reviewing court must scrutinize the legitimacy of the state's interest and whether the burden on interstate commerce clearly exceeds the local benefits. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 847 (1970). In distinguishing the two approaches, the salient issue is the overall effect the statute has on both local and interstate activity. 106 S.Ct. at 2084.

In *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 86 S.Ct. 1254 (1966), the Supreme Court first considered the constitutionality of an affirmation statute. The New York affirmation statute at issue in *Seagram* was "retrospective" in nature in that it required manufacturers to affirm to state authorities that the prices they charged in New York for alcoholic beverages during a given month were not higher than the lowest price charged in any other state during the preceding month. 86 S.Ct. at 1258. The Court upheld the statute, concluding that the "serious discriminatory effects of [the statute] alleged by appellants on their business outside New York are largely matters of conjecture." 86 S.Ct. at 1254. However, the Court stated that it would be willing to re-examine the issue when they

had enough time to assess the long-term extraterritorial effects of the statute, thus eliminating the "conjecture" of whether the regulatory scheme constituted an interference with the Commerce Clause. *Id.*

It was not until the *Brown-Forman Distillers* case, 106 S.Ct. 2080 ("Brown-Forman"), that the Supreme Court substantively examined the extraterritorial effects of an affirmation statute. The statute being questioned in that case was "prospective" in nature, in that it required an alcoholic beverage manufacturer to post a schedule of prices, that would be charged New York wholesalers, to be effective on the first day of the second following month and affirm that the price of liquor in the posted schedule would be no higher than the lowest price a comparable item would be sold anywhere in the United States during the month the schedule went into effect. *Id.* at 2083.

In keeping with its concern about the statutes effect on other states, the *Brown-Forman* Court explained that while New York could regulate the sale of liquor within its borders, and could legitimately seek low prices for its residents, it could not project its legislation into another state by regulating the price to be paid for liquors in that other state. *Id.* at 2086; *See also Baldwin v. G.A.F Seelig, Inc.*, 294 U.S. 511, 521, 55 S.Ct. 497, 499 (1935). Once more elaborating its concern about the *effect* affirmation statutes have on the liquor market in other states, the Court noted that the fact the New York law addressed only sales of liquor in New York was "irrelevant if the practical effect of the law [was] to control liquor prices in other States." 106 S.Ct. at 2086. Accordingly, the Court found that a "prospective" statute, such as New York's in *Brown-Forman*, regulated out-of-state transactions in violation of

the Commerce Clause. *See also United States Brewers' Ass'n v. Healy.* 692 F.2d 275 (2d Cir. 1982), *aff'd,* 104 S.Ct. 265 (the Second Circuit struck down Connecticut's "prospective" affirmation statute similar to the New York Statute).

The Commission correctly notes that the Supreme Court in *Brown-Forman* did not specifically overrule its earlier decision in *Seagram,* in which it sustained the facial constitutionality of New York's predecessor affirmation law. It is true that the *Seagram* Court in justifying its decesion stated that "[t]he mere fact that [the statute] is geared to appellant's pricing policies in other states is not sufficient to invalidate the statute." 86 S.Ct. at 1260. It is also true that Tennessee's affirmation statute is neither prospective nor retrospective, but "contemporaneous" in that a supplier must affirm that its prices are no higher that [sic] its prices elsewhere at the very time of the supplier's sale to a Tennessee wholesaler. Thus, theoretically, once a supplier has made its sale to a Tennessee wholesaler, it is free to alter its pricing policies in wholesale liquor transactions in other states as it chooses. The language of the Supreme Court in *Brown-Forman,* however, eschews such theoretical conjecturing and, instead, consistently states that the "practical effect" of the questioned statute is the touchstone for determining its validity. The Supreme Court in *Brown-Forman* readily notes that its reasoning in striking down the affirmation statute might undermine the *Seagram* holding and that, arguably, the contested statutes were similar. 106 S.Ct. at 2087 n.6. This Court need not act as arbitrator in resolving the Supreme Court's quandary. Perhaps Seagram is a "relic of the past" as suggested by Justice Blackmun in his concurring opinion. 106 S.Ct. at 2088.

What is clear to this Court is that the "practical effect" of Tennessee's affirmation statute, as currently set forth, is to control the prices of Brown-Forman products in other states. It is clear that if a liquor distiller, such as plaintiff, desires to raise its prices in Tennessee, it must raise its price first in every other state in which the product is sold. Tennessee's affirmation statute works to deny consumers in other states the benefits of a free competitive market and the availability of the 77-17 promotional allowance program or of quantity discounts fails to offset the extraterritorial effect of Tennessee's projected legislation.

Defendants also contend that the affirmation statute is a valid exercise of a state's power to regulate intoxicating liquors pursuant to the Twenty-First Amendment to the United States Constitution. It is well settled, however, that the Twenty-First Amendment did not entirely remove state regulation of alcohol from the reach of the Commerce Clause. 106 S.Ct. at 2087; *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 275, 104 S.Ct. 3049, 3057 (1984). Both the Twenty-First Amendment and the Commerce Clause are parts of the same Constitution and, accordingly, each must be considered in light of the other and in the context of the issues and interests at stake in any concrete case. *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332, 84 S.Ct. 1293, 1298 (1964). The Twenty-First Amendment empowers Tennessee with only the authority to control sales of liquor in Tennessee, not in other states, and the Commerce Clause becomes offended when one State attempts to regulate the transportation and sale of alcoholic beverages destined for distribution and consumption in another state. 106 S.Ct. at 2088. Further, state laws that constitute mere economic protectionism are not entitled to the same defer-

ence as laws enacted to combat the perceived evils of unrestricted traffic of alcoholic beverages. 104 S.Ct. at 3058. Accordingly, the Court rejects the defendant's reliance on the Amendment and finds that Tennessee's affirmation statute violates the Commerce Clause of the United States Constitution and defendants are hereby permanently enjoined from enforcing Tenn. Code Ann. § 57-3-202(e). An Order will be entered simultaneously with this Memorandum.

This the 30th day of June, 1987.

/s/ JOHN J. NIXON

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

Docket No. 3-86-0926

BROWN-FORMAN CORPORATION

vs.

THE TENNESSEE ALCOHOLIC BEVERAGE COMMISSION, ET AL.

ORDER

In accordance with the contemporaneously entered Memorandum, the Court hereby finds Tenn. Code Ann. § 57-3-202(e) to be in violation of the United States Constitution and, accordingly, the Tennessee Alcoholic Beverage Commisson is permanently enjoined from enforcing this statute.

Entered this the 30th day of June, 1987.

/s/ JOHN J. NIXON

UNITED STATES DISTRICT JUDGE

Tenn. Code Ann. § 57-3-202(e)

(1) Every manufacturer, distiller, rectifier, factor, broker, or vintner of alcoholic spirituous beverages or vintage alcoholic beverages shall, before offering for sale to any licensed wholesaler or distributor in the state of Tennessee any brand of alcoholic spirituous beverage or vintage alcoholic beverages, file with the alcoholic beverage commission an affirmation of corporate policy with regard to sales of all brands owned, controlled, sold, offered for sale, franchised or distributed by such manufacturer, distiller, rectifier, factor, broker or vintner in this state;

(2) The affirmation shall certify that the manufacturer, distiller, rectifier, factor, broker or vintner shall not willfully sell or offer for sale any alcoholic spirituous beverage or vintage alcoholic beverage of a particular brand, proof or size, in Tennessee at a price higher than the price such liquors are sold or offered for sale to licensed wholesalers in any other state in the United States.

(3) "Price" as used in this subsection shall mean platform price at the distillery and shall not include price differentials based on transportation costs, containers or other costs not directly related to the quality and proof of the product concerned. Quantity discount prices for liquors sold to monopoly states or elsewhere shall not be considered to be violation of the manufacturer's distiller's, rectifier's factor's, broker's, or vintner's affirmation if such discount prices are also offered to Tennessee wholesalers for purchases in the same quantities;

(4) Any person, firm or corporate official who makes a false statement in any affirmation filed hereunder shall be guilty of a misdemeanor and shall be punished by a fine

or not more than one thousand dollars ($1,000) and by imprisonment for not more than six (6) months. Every affirmation filed hereunder shall be deemed to have been made in each county in Tennessee where alcoholic spirituous beverages or vintage alcoholic beverages are legally offered for sale;

(5) Any manufacturer, distiller, rectifier, factor, broker, or vintner, who fails to file such affirmation or willfully violates the pledges contained therein shall have its license and privileges to import and sell alcoholic spirituous beverages or vintage alcoholic beverages in the state refused, revoked or suspended by the alcoholic beverage commission for a period of not less than one (1) year;

(6) For the purpose of carrying out the provisions of this subsection, each licensed manufacturer, distiller, rectifier, factor, broker or vintner in the state of Tennessee offering for sale to any licensed wholesaler or distributor in the State of Tennessee any any brand of alcoholic spiritious beverages or vintage alcoholic beverages shall file the affirmation as herein provided with the alcoholic beverage commission not later than sixty (60) days after May 13, 1975, and thereafter shall file the same in accordance with the provisions as contained in subsection (e)(1), and other pertinent statutes.